Supreme Court, U.S.
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No. 03-220

In The Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT GMC MANSFIELD METAL FABRICATING IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

This action was instituted by Petitioner Allen Lee May against his current employer General Motors Corporation ("GM") and his Union (the UAW International and UAW Local 549), alleging causes of action for: (1) race discrimination against GM and the Union under 42 U.S.C. §1981; (2) race discrimination against GM and the Union under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* ("Title VII"); (3) race discrimination against GM and the Union under Ohio Revised Code Chapter 4112 (Ohio's anti-discrimination statute); (4) and breach of contract against the Union.

The facts presented to the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit are straightforward. The District Court accurately restated these facts in its Decision. [Petition Appendix pp. 9a-17a]. On October 26, 1983, General Motors hired Petitioner, as a journeyman pipefitter, at its facility in Pontiac, Michigan. Petitioner continued to work for GM over the next fourteen years at several GM facilities in Michigan and New York. In April 1997, Petitioner applied for and received a transfer to GM's Metal Fabrication facility, in Mansfield, Ohio ("the Mansfield Facility"). All of the allegations in the instant action relate to Petitioner's employment at the Mansfield facility. Briefly stated, Petitioner alleges that he was denied the opportunity to work overtime, disciplined, required to attend alcohol rehabilitation, denied the opportunity to work during shut down, and denied a welding position, all on the basis of his race. Petitioner also claims that he experienced a racially hostile work environment while working at the Mansfield facility.

As noted, Petitioner alleges that he was denied the opportunity to work overtime on account of his race. However, equalization of overtime among employees at the Mansfield facility is governed by several contractual provisions in the National Collective Bargaining Agreement between GM and the UAW International ("the National Agreement") and the Local Agreement between GM and UAW Local 549 ("the Local Agreement"). GM was required to equalize overtime as much as practicable between Petitioner and Gary Mills, the other second shift pipefitter in Petitioner's group. Petitioner claims that Mills, who is Caucasian, was given the opportunity to work more overtime.

Overtime boards are posted within each department at the Mansfield facility, so that all employees may review their standing. Although Petitioner alleges that he was shorted 200 hours of overtime in 1999, the overtime boards do not show a difference of 200 hours, or any other significant difference, between Petitioner and Mills. A review of the overtime boards from March through June of 1999 shows that sometimes Petitioner had more overtime hours than Mills, and sometimes Mills had more overtime hours than Petitioner, but the two were always within close range of each other. Overtime hours are rarely exactly equal.

Petitioner also claims that he was disciplined on account of his race. In this regard, the facts show Petitioner was disciplined on the following occasions. On January 13, 1998, Petitioner reported to work at his regularly scheduled time. The Company was notified by plant security that Petitioner was observed staggering into the facility. Members of GM management and UAW Local 549 officials also had an opportunity to observe Petitioner

and determine that he was under the influence of alcohol. When Petitioner returned to work on January 16, 1998, GM issued a disciplinary layoff ("DLO") of one week plus the balance of the shift for reporting to the plant under the influence of alcohol and in an unsafe condition. The discipline was later modified, as part of a settlement between the Company and the UAW Local 549.

Several months later, on November 2, 1998, Petitioner attempted to gain access to the plant through security. Again, plant security reported to the Company that Petitioner's speech was slurred, and that his balance was unstable. Petitioner was observed by GM management in what appeared to be an intoxicated state and was denied access to the plant. Petitioner was issued a DLO of one week for reporting to the plant under the influence of alcohol and in an unsafe condition. The discipline was later modified as part of a settlement between the Company and the UAW Local 549.

Two months later, on January 29, 1999, Petitioner got into an altercation with his supervisor, John Clark, who instructed Petitioner to report to Labor Relations. However, instead of doing so, Petitioner left the plant and went home. On February 1, 1999, Petitioner was given a two-week DLO for leaving the plant during working hours without permission. Once again, the discipline was modified, due to a settlement between the Company and the UAW Local 549, and Petitioner served a DLO of the balance of shift and three days. Pursuant to the settlement, the discipline would have been removed from Petitioner's record after nine months if he had no further rule violations during that time period.

Next, Petitioner claims that he was required to go on sick leave and participate in an alcohol rehabilitation program on account of his race, and that he was denied the opportunity to work during the shut down while on sick leave. On July 1, 1999, Petitioner's Supervisor, John Clark, and General Supervisor, Pete Lang, observed Petitioner and concluded that he was under the influence of alcohol, as a result of the odor of alcohol on his breath, his slurred speech, and his general mannerisms. Clark suspended Petitioner for being under the influence of alcohol and in an unsafe condition, and requested that Petitioner report to Labor Relations on July 2, 1999, for a disciplinary interview.

At the disciplinary interview, Petitioner was informed that he was being given a thirty-day suspension for being intoxicated at work. The thirty-day suspension was mandated because Petitioner's February 1, 1999 discipline was still on his record. Despite Petitioner's disciplinary history and obvious problems with alcohol, UAW Local 549 officials convinced the Company to work out a settlement, under which Petitioner was permitted to take a thirty-day paid sick leave, in lieu of the thirty-day suspension, on the condition that he attend an alcohol rehabilitation program and follow-up counseling. Petitioner denies that he has a problem with alcohol, but admits that the Company honestly believed that he was intoxicated at the plant. Petitioner agreed to the settlement and attended a rehabilitation program in Michigan, which was paid for by his GM benefits.

During Petitioner's sick leave, the Mansfield plant shut down its operations, as it does every July. Employees may apply for work during times of plant shutdown, as some work is still being performed. However, employees on

sick leave are not eligible to work during the shutdown. Petitioner understood when he agreed to settlement that he would not be able to work during a shutdown.

Finally, Petitioner claims that he was denied a welding position on account of his race. On June 17, 1999, the Mansfield facility posted job openings for a journeyman die welder and a journeyman gas/arc welder. On June 18, 1999, Petitioner and seven other employees applied for the gas/arc welder position. Open positions that are filled internally are awarded to the qualified employee with the most seniority who applies for the position. William French was awarded the gas/arc welder position. Even if Petitioner had been qualified for the position, he would not have been awarded it because French, with a seniority date of July 12, 1965, had far more seniority than Petitioner, whose seniority date is December 13, 1983. In any event, Petitioner was not qualified for the gas/arc welding position because he was not classified as a journeyman welder and did not have a journeyman welder card from the UAW. Without a journeyman welder card, the Company could not award Petitioner the gas/arc welder job that he applied for, regardless of his seniority.

Petitioner's hostile work environment claim is based on the same allegations asserted in support of his disparate treatment claim. Additionally, Petitioner points to three incidents that he claims establish a racially hostile work environment. First, Petitioner claims that there was a racially offensive cartoon posted on one of the bulletin boards at the plant. When Petitioner noticed the cartoon, he complained to the Union (not to the Company), and in any event, it was immediately taken down. Second, Petitioner points to the tag which was allegedly placed on coworker Billy Feagin's scooter, which said "worthless

nigger". However, Petitioner has no knowledge regarding who was responsible for the tag, whether there was an investigation, or whether the Company disciplined anyone. Third, Petitioner alleges that he learned of a noose hanging in different locations throughout the plant, but he concedes that they were taken down after being reported to the Company or the Union.

Following discovery, Respondents filed Motions for Summary Judgment, which were opposed by Petitioner. On April 29, 2002, the District Court issued an Opinion and Order dismissing Petitioner's claims. Petitioner timely filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On March 20, 2003, the Sixth Circuit issued a Memorandum Opinion and Order affirming the judgment of the District Court. Thereafter, Petitioner filed the instant Petition. For the reasons presented below, Respondent GM respectfully submits that the Court deny the Petition.

II. REASONS FOR DENYING THE PETITION

The Petition presents no issue meriting this Court accepting certiorari jurisdiction. Pursuant to Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." "[A] petition for a writ of certiorari will be granted only for compelling reasons," such as where:

> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

Sup. Ct. R. 10.

Petitioner has cited no legal authority to support his argument that this Court should accept this case for review, nor any reason to set this case apart from any other race discrimination case. Petitioner has cited neither contrary legal authority in the Sixth Circuit nor a split among the Circuits that would justify this Court allocating time on its limited docket to consider this routine race discrimination case. In fact, Petitioner's argument for review is simply a rehash of his already rejected arguments as to why the District Court's decision was incorrect. Petitioner does not claim that the lower Court applied an incorrect legal standard. Rather, he merely disagrees with its application of the facts. However, mere disagreement with a lower court decision is not grounds for Supreme Court review.[1]

A. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Disparate Treatment Cases.

The standards to be applied in analyzing a case of indirect discrimination under Title VII are well established, and Petitioner does not claim that the District Court or Sixth Circuit applied an incorrect legal standard. Disparate treatment cases are subject to the following tripartite analysis: (1) the plaintiff must establish a *prima facie* case of discrimination; (2) only then does the burden shift to the defendant to articulate a legitimate non-discriminatory reason for its actions; and (3) if it does, the

[1] Supreme Court Rule 10 provides: "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

plaintiff must then prove that the reason offered is, in fact, a pretext for discrimination and that intentional discrimination motivated the action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-802 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-258 (1991).[2]

Here, Petitioner does not claim to have any direct evidence of race discrimination. In order to establish a *prima facie* case of race discrimination, Petitioner was required to show that: 1) he is a member of a protected class; 2) he was subjected to adverse employment actions; 3) he was qualified for the position in question; and 4) he was replaced by a nonprotected person or similarly situated nonprotected employees received preferential treatment. *McDonnell Douglas*, 411 U.S. at 802. The lower Courts found that Petitioner could not establish a *prima facie* case of race discrimination. Therefore, it was unnecessary to determine whether Petitioner could show that GM's legitimate, non-discriminatory reasons for its actions were a pretext for race discrimination.

Specifically, the District Court and Sixth Circuit correctly noted that Petitioner presented no evidence that he was treated less favorably than similarly situated nonminority employees at the Mansfield facility. There is simply no evidence that Mills received more overtime than Petitioner, because the overtime records indicated that overtime was equalized between the two employees.

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[2] This Court has held that claims for race discrimination under 42 U.S.C. §1981 are analyzed under the same evidentiary framework enunciated by the federal courts for race discrimination claims under Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989).

Petitioner is also unable to establish that GM's disciplinary actions toward him were racially motivated because there is no evidence that comparable Caucasian employees were treated better in like circumstances. In fact, Caucasian employees at the Mansfield facility were also disciplined for being under the influence of alcohol. Likewise, there is no evidence that any other non-minority employees on sick leave were ever permitted to work during the shutdown. Finally, the lower Courts found that Petitioner was unable to establish a *prima facie* case based on being denied the welder position because he was not qualified for the position, and the employee that was awarded the position was not similarly situated to Petitioner because he was qualified and had several more years seniority.

The Courts below properly applied the four-step process of establishing a *prima facie* case under *McDonnell Douglas*. Petitioner cannot argue that the lower Courts failed to follow this Court's well-established precedent. Instead, he argues that the lower Courts did not scrutinize the facts and improperly resolved factual disputes in favor of Respondents. As discussed above, Petitioner is not entitled to this Court's review only to rehash the evidence presented in this case. Petitioner also claims to have evidence of pretext. However, this argument is pointless because the Courts below were not required to consider pretext given that Petitioner could not establish a *prima facie* case.

B. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Hostile Work Environment Cases.

Like the legal standards for disparate treatment cases under Title VII, the standards for analyzing hostile work

environment cases have also been previously established by this Court. In order to establish a *prima facie* case of hostile work environment based on race, a plaintiff must show: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment had the effect of unreasonably interfering with the employee's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of employer liability. A hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult "that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

The lower Courts applied this Court's established principles in holding that the allegations in support of Petitioner's disparate treatment claim were also insufficient to establish a *prima facie* case of hostile work environment racial harassment, for the same reasons discussed above. Moreover, the additional three isolated incidents were not sufficiently severe or pervasive to alter the conditions of Petitioner's employment or to create an abusive work environment. *See Harris*, 510 U.S. at 21. Petitioner offers no explanation whatsoever as to why this Court should review the lower Court's dismissal of his hostile work environment claim.

C. Petitioner Has Not Provided Any Justification For Revisiting Its Well-Established Standards In Title VII Cases.

Petitioner urges this Court to accept review in order to overturn or soften the standards for establishing a *prima facie* case and the burden shifting provisions set forth in *McDonnell Douglas* and its progeny. However, Petitioner presents no compelling reason for revisiting *McDonnell Douglas*, which has provided consistent standards for analyzing discrimination cases under Title VII and other employment statutes for thirty years. The only justification offered by Petitioner for revisiting these standards is that minorities allegedly have difficulty obtaining counsel and often have their cases dismissed on summary judgment. This reasoning is flawed and plainly insufficient to justify this Court's review.

III. CONCLUSION

For the foregoing reasons, Respondent GM respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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